U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WAYNE V. SAYLORS and DEPARTMENT OF THE AIR FORCE, SACRAMENTO AIR LOGISTICS CENTER, McCLELLAN AIR FORCE BASE, CA

Docket No. 98-2025; Submitted on the Record;
Issued February 1, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for further review of his case on its merits under 5 U.S.C. § 8128(a) on the grounds that it was untimely filed and presented no clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The only decision before the Board on this appeal is the Office's May 14, 1998 decision denying appellant's request for a review on the merits of the March 29, 1996 merit decision.[1] Because more than one year has elapsed between the issuance of the Office's March 29, 1996 merit decision and June 19, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior Office decision.[2]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[4] To be entitled to a merit review of an Office decision

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[1] This decision denied fact of left knee injury.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

[4] 20 C.F.R. §§ 10.138(b)(1), (2).

denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[5] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[6] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[7]

In its May 14, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on the issue appealed on March 29, 1996 and appellant's first request for reconsideration was dated August 2, 1997, which was clearly more than one year after March 29, 1996. Therefore, appellant's requests for reconsideration of his case on its merits were untimely filed.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[8] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise, and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be

[5] 20 C.F.R. § 10.138(b)(2).

[6] *Joseph W. Baxter*, 36 ECAB 228 (1984).

[7] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[8] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996). The Office therein states:

> "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

[10] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[11] *See Leona N. Travis*, 43 ECAB 227 (1991).

[12] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

construed so as to produce a contrary conclusion.[13] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[14] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[15] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[16]

In the present case, with his request for reconsideration of the March 29, 1996 decision, appellant submitted repetitious medical evidence previously considered by the Office and two new reports from Drs. Roy N. Pottenger, a Board-certified orthopedic surgeon and Franklin J. Chinn, Jr, a family practitioner. By report dated June 6, 1996, Dr. Pottenger noted appellant's history of his supervisor knocking his leg off the desk, on which he was resting it, noted that he, thereafter, underwent surgery for a preexisting medial meniscus tear which had been scheduled prior to the alleged incident, discussed findings upon physical examination and diagnosed postoperative continuation of discomfort along the medial line with positive McMurray's possible residual tear of the medial meniscus. He noted appellant's complaints that the incident at work exacerbated his preexisting medical meniscus tear, but noted that it was impossible for him to say, with the data he had available whether or not that took place. As Dr. Pottenger's report was speculative and inconclusive and, therefore, did not demonstrate any clear evidence of error on its face on the part of the Office in its March 29, 1996 decision, as the Office properly ascertained. Therefore, the Board now finds that it is indeed insufficient to reopen appellant's case for further consideration on its merits.

Also submitted was a May 6, 1996 report from Dr. Chinn which reported a history of appellant's supervisor knocking appellant's leg off the desk, noted that appellant claimed that this aggravated his preexisting left knee problem and noted that he subsequently underwent surgery for a left medial meniscus tear. Objective findings were noted and he diagnosed chronic left knee pain secondary to strain injury on February 22, 1995.[17] The extent of appellant's preexisting left knee condition was not discussed. As Dr. Chinn's report was incomplete and unrationalized it did not demonstrate any clear evidence of error on its face on the part of the Office in its March 29, 1996 decision, as the Office properly ascertained. Therefore, the Board now finds that it is indeed insufficient to reopen appellant's case for further consideration on its merits.

[13] *See Leona N. Travis, supra* note 11.

[14] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[15] *Leon D. Faidley, Jr., supra* note 7.

[16] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

[17] Appellant's November 6, 1995 claim was for knee injury, of which he became aware on March 15, 1995.

As this evidence does not raise a substantial question as to the correctness of the prior March 29, 1996 Office decision or *prima facie* shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

The Office, therefore, did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

Accordingly, the decision of the Office of Workers' Compensation Programs dated May 14, 1998 is hereby affirmed.

Dated, Washington, D.C.
February 1, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member